

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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<i>In re</i>)	CONSOLIDATED DOCKET NO.
DISTRIBUTION OF CABLE)	14-CRB-0010-CD
ROYALTY FUNDS)	(2010-13)
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CTV'S REPLY BRIEF IN RESPONSE TO THE JUDGES' JUNE 29, 2018 ORDER

The Commercial Television Claimants ("CTV") provide this Reply Brief in response to the initial briefs filed by other parties to this proceeding pursuant to the Order issued by the Judges on June 29, 2018 (the "Order").

In the Order, the Judges request information and argument from the parties regarding the need for a mathematical adjustment to the Basic Fund shares of the Public Television Claimants ("PTV") in order to reflect PTV's ineligibility to receive any portion of the 3.75 royalty funds (the "Adjustment").

On July 16, 2018, CTV filed its Initial Brief in response to the Judge's Order. CTV demonstrated that making such an Adjustment is warranted if the Judges follow their own precedent in *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063 (Sept. 17, 2010) (the "2004-2005 Distribution Order"), as CTV urged the Judges to do in its April 5, 2018, Proposed Findings of Fact and Conclusions of Law ("CTV PFF/PCL"). CTV's Initial Brief also repeated the step-by-step calculations, including the Adjustment, that it had presented in its April 20, 2018, Responses to Proposed Findings of Fact and Conclusions of Law ("CTV RPFF/PCL").

In their Initial Briefs in response to the Order, CTV, JSC, Program Suppliers, and SDC argue that an Adjustment is supported by precedent only if the Judges base their 2010-2013 royalty allocation determinations on the Bortz survey shares.¹ Canadian Claimants Group provides references to 2010-2013 record evidence that could be used to perform the Adjustment if one is made.² Only PTV argues that an Adjustment (which it calls an “Evidentiary Adjustment”) should be made if the Judges base their 2010-2013 royalty allocations on evidence other than the Bortz survey.³

Following are CTV’s responses to the Initial Briefs of other parties.

A. There is No Legal Precedent for Making an Adjustment in PTV’s Basic Fund Share if the Judges Use Evidence Other Than the Bortz Survey Results as the Starting Point in Making Their 2010-2013 Allocations

PTV acknowledges that its requested Adjustment was expressly rejected in the 1989 and 1990-1992 cable royalty distribution proceeding decisions.⁴ In reviewing the 1990-1992 allocation determinations, the Librarian drew a clear distinction between allocations based on Bortz survey results, where an Adjustment “might have some validity,” and allocations based on other types of evidence, where the Adjustment was properly rejected.⁵

¹ CTV’s Initial Brief in Response to the Judges’ June 29, 2018 Order (“CTV Br.”) at 1, 4-6; Joint Sports Claimants’ Response to Order Soliciting Further Briefing (“JSC Br.”) at 2, 4-6; Program Suppliers’ Memorandum of Law and Supporting Declarations Responding to Order Soliciting Further Briefing (“PS Br.”) at 2, 7; Settling Devotional Claimants’ Brief in Response to Order Soliciting Further Briefing (“SDC Br.”) at 2, 5.

² Response of Canadian Claimants Group to the Judges’ June 29 Order Soliciting Further Briefing (“CCG Br.”) at 4-6. In this Reply Brief, CTV presents alternative share calculations reflecting these record data, which differ only slightly from those CTV presented in its Initial Brief.

³ Public Television Claimants’ Brief Addressing Rationale and Calculation of Basic Fund Adjustment in Accordance With the Judges’ June 29, 2018 Order (“PTV Br.”) at 12-17.

⁴ PTV Br. at 5. *See 1989 Cable Royalty Distribution Proceeding*, 57 Fed. Reg. 15286, 15300, 15303 (Apr. 27, 1992); *1990-1992 CARP Report* (May 31, 1996) at p. 124 & n.539.

⁵ *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. 55653, 55668 (Oct. 28, 1996).

PTV then asserts that the CARP in the 1998-1999 cable royalty distribution proceeding “reversed course” and held that the Adjustment should be made.⁶ To the contrary, however, the CARP held only that an Adjustment should be made where allocations are based on the Bortz survey results, and stated emphatically that “we *disagree* with PTV’s assertion that it is entitled to such an adjustment *no matter which methodology* is employed.”⁷ Indeed, the CARP expressly rejected an argument that an Adjustment should be made in PTV’s share when it is measured through a regression analysis.⁸

PTV misleadingly asserts that on review of this decision, the Librarian “found no issue with the 1998-99 Panel’s method for calculating PTV’s award” and that the Librarian “observed that, even after applying the Evidentiary Adjustment,” PTV did not receive 3.75 or Syndex royalties.⁹ But in fact, the 1998-1999 CARP did not make any “Evidentiary Adjustment” in PTV’s share.¹⁰ The Librarian’s affirmance of the PTV award not only includes no “observation” by the Librarian about the PTV award “even after applying the Evidentiary Adjustment;”¹¹ that decision is further authority for the consistently followed principle that no Adjustment may be

⁶ PTV Br. at 6.

⁷ *1998-1999 CARP Report* (Oct. 21, 2003) at p. 26 n.10 (emphasis in original).

⁸ *Id.* at 48 n.21.

⁹ PTV Br. at 6 (emphasis added).

¹⁰ The CARP did not calculate PTV’s share based on any of the quantitative studies presented in the case, but only awarded PTV the exact same share it had received in 1990-1992, 5.41925%. *1998-1999 CARP Report* (Oct. 21, 2003) at p. 69.

¹¹ The Librarian’s reference to the “*net* distribution percentage[] for PBS,” *Distribution of 1998 and 1999 Cable Royalty Fund*, 69 Fed. Reg. 3606, 3609 n.15 (Jan. 26, 2004) (emphasis in original), is to a percentage share of total royalties including all claimant groups except NPR. *See 1998-1999 CARP Report* (Oct. 21, 2003) at p. 69 n.42. It does not reflect an Adjustment.

made where allocation percentages are based on quantitative evidence other than the Bortz survey results.¹²

As PTV then correctly explains, the Judges in their 2004-2005 allocation determination expressly incorporated the proposed Adjustment in determining PTV's Basic share.¹³ But they did so only in connection with shares based on the Bortz survey results as a starting point, citing Proposed Findings that quoted the same footnote in the 1998-1999 CARP determination that had rejected an Adjustment for shares based on other methodologies.¹⁴

None of the authority cited by PTV in its Brief supports making an Adjustment where allocation shares are not based on the Bortz survey shares. Indeed, to the extent the issue has been expressly addressed in prior proceedings, a non-Bortz-survey-based Adjustment has consistently been rejected.¹⁵

B. There is No Evidence in the 2010-2013 Record That Would Permit the Calculation of a Proper Adjustment if Shares Were Based on Other Methodologies

PTV proposes that the Judges determine allocation percentages based on regression analyses rather than the Bortz survey, and that those percentages should be modified through application of the Adjustment.¹⁶ PTV failed to provide any quantitative evidence in this

¹² The Librarian affirmed the CARP's award to PTV in 1998-1999 of the exact same amount awarded in 1990-1992, a decision in which the CARP expressly rejected the use of an Adjustment in setting the PTV share. *See 1990-1992 CARP Report* at p. 124 & n.539; *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. at 55668.

¹³ PTV Br. at 7. *See 2004-2005 Distribution Order*, 75 Fed. Reg. at 57070.

¹⁴ *2004-2005 Distribution Order*, 75 Fed. Reg. at 57070. *See* CTV Br. at 4-5 (quoting the underlying Proposed Finding cited by the Judges, which itself cited, in underlying n.751, Footnote 10 in the 1998-1999 CARP Report as authority for the Adjustment).

¹⁵ *See 1998-1999 CARP Report* at p. 26 n.10; *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. at 55668.

¹⁶ PTV Br. at 17 & n.85. Program Suppliers argue that the allocations should be made on the basis of Dr. Gray's "viewing" study and the Horowitz survey results rather than the Bortz survey, but that no

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proceeding supporting the proper calculation of any adjusted Basic Fund share for PTV if the Judges were to use regression shares as their starting point, other than Ms. McLaughlin's presentation of a method of making the same simple arithmetic adjustments to them that the Judges have used only for Bortz-based share awards.¹⁷ Even if an Adjustment to non-Bortz-based shares were consistent with prior precedent, PTV would have had to provide evidence that properly supported such an Adjustment in this new context.

Dr. Crawford's regression design used the relative amounts of distant signal programming in the various claimant categories as the key independent variables, and royalties actually paid by Form 3 cable systems as the dependent variable, on a subgroup-by-subgroup basis.¹⁸ But he also included control variables, specifically including a variable indicating whether the cable operator paid any 3.75 royalties for each subgroup.¹⁹ Dr. Crawford explained that this and other control variables were included in order "to control for factors influencing the royalty paid by a cable system *other than* distant broadcast signal programming content."²⁰

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Adjustment should be made, PS Br. at 9, but those studies are neither valid nor reliable. *See* CTV PFF/PCL 131-144 (Horowitz), 160-208 (Gray), 238; CTV RPFF/PCL 10-15 (Gray).

Program Suppliers also present once again the results of what Dr. Gray falsely testified in his Written Rebuttal Testimony was an "attempted replication" of Dr. Crawford's regression analysis that simply excluded data from minimum-fee subgroups, which Dr. Gray now purports to adjust arithmetically to suggest shares of the 3.75 Fund. PS Br. at 8 & n.23, Ex. A at pp. 5-6 ¶10 & Table 3. But Dr. Crawford testified, and Dr. Gray ultimately admitted on cross-examination, that Dr. Gray "modified" Dr. Crawford's regression model, and his analysis thus did not replicate Dr. Crawford's analysis. *See* CTV PFF/PCL 52, 54 & n. 109; CTV RPFF/PCL 26. Dr. Gray's new "Market-Based Royalty Shares, 2010-2013 (Applicable to 3.75% Fund)," PS Br. at Ex. A, p. 6 Table 3, should be rejected for the same reasons.

¹⁷ PTV Br. at 12 & n.59.

¹⁸ CTV PFF/PCL 33-35.

¹⁹ *Id.* at 36.

²⁰ Ex. 2004 at ¶106 (Crawford WDT) (emphasis in original).

Thus, although PTV asserts that Dr. Crawford's regression measured value based on what PTV calls the "Combined Royalty Funds,"²¹ or the total of all Basic, 3.75, and Syndex royalties,²² Dr. Crawford's regression analysis, by design, sought to isolate and remove the influence of the 3.75 rate on total royalties in measuring those shares.²³ Although it would have been possible for PTV to perform other analyses to calculate a proposed regression-based PTV share just for programming on Basic-Fund distant signals, it did not do so,²⁴ and nothing in the 2010-2013 record reflects such alternative analyses.²⁵

PTV does identify evidence from a prior proceeding, however, that may shed light on the question of whether the Adjustment would be appropriate if the Judges were to use the Crawford regression shares as a starting point for the allocations. PTV cites the Written Direct Testimony of 2004-2005 CTV witness Dr. Joel Waldfogel, which was incorporated by reference in this proceeding by CCG as Ex. 4005, and in which Dr. Waldfogel described his own regression analysis.²⁶ As part of that Written Direct Testimony, Dr. Waldfogel presented the results of various "robustness" tests he ran on his analysis, including removing his control variable for payment of 3.75 royalties.²⁷ PTV quotes his conclusion from the test, that his methodology was robust because the PTV share "changes little" when the particular control variable is removed.²⁸

²¹ PTV Br. at 13.

²² *Id.* at 1.

²³ Ex. 2004 at ¶¶106, 117-118, 162 (Crawford WDT). *See also* SDC Br. at 8.

²⁴ *See* PTV Br. at 10 n.50 (conceding that parties' experts could have presented studies showing different relative shares for different funds, but did not do so).

²⁵ *See* SDC Br. at 8 n.5 (describing an approach of "interacting" the 3.75 variable with other variables, which PTV might have pursued, that could have produced alternative evidence about the Crawford regression results seeking to measure the effect of 3.75 royalties on the shares in a different way).

²⁶ PTV Br. at 14-15.

²⁷ Ex. 4005 at CCG-5-B, pp. 41-42 (George) (designating Waldfogel 2004-2005 WDT).

²⁸ PTV Br. at 14-15.

But in fact, the point estimate for the PTV share in his study was almost 20% lower when the 3.75 variable was removed than when that variable was included (5.52% versus 6.79%).²⁹

In other words, the version of Dr. Waldfogel's regression that encompassed what PTV calls the "Combined Royalty Funds" (Basic, 3.75, and Syndex) but did not include an indicator variable to account for the impact of the 3.75 rate at which only non-PTV signals are carried resulted in a lower share for PTV and a collectively higher relative share for the non-PTV program categories. For purposes of the questions the Judges' Order has posed, this may provide some at least suggestive indirect evidence in the record of this proceeding that the effect of PTV's ineligibility to receive 3.75 royalties may already be accounted for to some degree by the inclusion of a 3.75 control variable in a regression that uses total royalties as the dependent variable.³⁰

PTV has not provided or cited any evidence that would support a valid method for calculating its requested Adjustment to its Basic Fund share if the Judges were to use Dr. Crawford's regression analysis shares,³¹ or any alternative quantitative evidence, as the starting

²⁹ Compare Ex. 4005 at CCG-5-B, p. 41, Col. 1, with *id.*, Col. 7.

³⁰ The indirect information provided by this comparison is not definitive in this proceeding, of course. First, Dr. Waldfogel's regression differed significantly from Dr. Crawford's in terms of methodology (it used systems, not subgroups, did not use fixed effects, and used a sample of program data rather than all data) and time period (2004-2005 rather than 2010-2013). Ex. 4005 at Ex. CCG-5-B pp. 10, 34-36; Ex. 2004 at ¶¶71-72 (Crawford WDT). Second, the coefficients for PTV programming were statistically insignificant in Dr. Waldfogel's regression. *Id.* at Ex. 4005 at Ex. CCG-5-B pp. 11, 41; see CTV PFF/PCL 222. And finally, simply removing a properly included control variable from a properly specified regression may produce misleading results. See Tr. 1643 (Crawford) (explaining that control variables that are economically meaningful and that turn out to be statistically significant should be included in the regression). The coefficient for the 3.75 control variable in Dr. Crawford's regression was both large and statistically significant. Ex. 2004 (Crawford WDT) at App. B Fig. 22.

³¹ If the Judges were to choose to refer to Dr. Crawford's regression results for any purpose in their determination, they should begin with the specification that eliminates duplicated network programming rather than the version PTV prefers. Ex. 2004 at ¶¶143-147 & Fig. 20 (Crawford WDT); see PTV Br. at McLaughlin Affid. p. 8, Table 1 and PTV PCL 31 & n.49 (referring to Crawford WDT Fig. 17).

point for their 2010-2013 allocations.³² But the evidence incorporated from the 2004-2005 proceeding and cited by PTV suggests that no such adjustment would be warranted.

C. Alternative Step-By-Step Calculations

In its Initial Brief, CTV provided step-by-step calculations using adjusted Augmented Bortz survey shares as the starting point and then applying the Adjustment adopted by the Judges in the 2004-2005 Proceeding.³³ CTV calculated the Adjustment to the Basic Fund share for PTV by dividing the adjusted Augmented Bortz PTV share for each year by the “Nonparticipation Factor” calculated by Ms. McLaughlin in Exhibit 1101.³⁴ Ms. McLaughlin’s factors, however, were calculated based on Cable Data Corporation (“CDC”) royalty fund data from the first Accounting Period of each year only.³⁵

The Canadian Claimants Group’s Initial Brief referred to an alternative source in the record for the royalty fund data used to calculate “Nonparticipation Factors,” which was the Written Direct Testimony of CCG witness Jonda Martin of CDC.³⁶ These data provide royalty fund amounts for both Accounting Periods, combined, in each year.³⁷

In light of the citation of this alternative data source, CTV has recalculated its proposed Final Shares for the Basic and 3.75 Funds³⁸ using the royalty fund data from Ex. 4009 in place of

³² CTV does not address the availability of any record evidence to support an Adjustment if the Judges were instead to use Program Suppliers’ “viewing” study as the starting point for its allocations, because that study cannot be relied upon. CTV PFF/PCL 52, 54 & n. 109; CTV RPFF/PCL 26.

³³ CTV Br. at 7-11.

³⁴ *Id.* at 6-7, 10 n.19.

³⁵ *See* Ex. 1101.

³⁶ CCG Br. at 5, *citing* Ex. 4009 at 7, Table 1a.

³⁷ *Id.*

³⁸ *See* CTV Br. at 10-11, Sections C.(e) and (f).

that from Ex. 1101,³⁹ and also using the spreadsheet provided by PTV with its initial brief as “PTV Appendix 2 to McLaughlin Affidavit.”⁴⁰ After performing the Adjustment calculation using these new sources, starting with the same adjusted Augmented Bortz shares it used previously, CTV’s proposed Final Basic and Final 3.75 Fund awards are as follows:

Final Basic Fund Shares (using Ex. 4009)				
	2010	2011	2012	2013
JSC	39.7%	37.1%	38.5%	38.2%
CTV	18.1%	18.7%	23.2%	22.9%
PS	28.3%	28.7%	25.0%	22.6%
PTV	8.7%	10.2%	8.1%	10.4%
Devotional	2.4%	2.5%	2.6%	2.7%
Canadian	2.9%	2.9%	2.7%	3.3%

Final 3.75 Fund Shares				
	2010	2011	2012	2013
JSC	43.5%	41.3%	41.9%	42.6%
CTV	19.8%	20.8%	25.3%	25.6%
PS	31.0%	32.0%	27.2%	25.2%
PTV	0.0%	0.0%	0.0%	0.0%
Devotional	2.6%	2.7%	2.8%	3.0%
Canadian	3.1%	3.2%	2.9%	3.6%

These shares differ only minimally from those presented in CTV’s Initial Brief.

³⁹ Again, however, as CTV has noted previously, the Judges may base the calculation of the “Nonparticipation Factors” used in this step on the current actual fund splits available from the Licensing Division rather than on the CDC data. *See* CTV RPFF/PCL at n.157; CTV Br. at n. 19.

⁴⁰ PTV Br. at 17 & App. 2 to McLaughlin Affid. This spreadsheet also incorporates Ms. McLaughlin’s minimal adjustment for non-participation in the Syndex Fund (dividing by .9999).

CONCLUSION

There is neither any legal or administrative authority nor any evidence in the now-closed record of this proceeding that would support the adoption of an Adjustment to the PTV Basic Fund shares if the Judges were to rely on any methodology other than the Bortz survey as the starting point for their allocation determinations.

Respectfully submitted,

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Dated: July 30, 2018

Proof of Delivery

I hereby certify that on Monday, July 30, 2018 I provided a true and correct copy of the CTV's Reply Brief in Response to the Judges June 29, 2018 Order to the following:

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